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SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1984

SUCCESSION OF SALVADOR CAPRITO,
a/k/a S. CAPRITO

On Writ of Certiorari
to the Supreme Court of Louisiana

JOSEPH T. CAPRITO and
MARGUERITE CAPRITO DIAL — PETITIONERS

V.

JAMES C. MAYHEW, a/k/a
NOEL CAPRITO, HELEN VAUGHAN
and GERTRUDE CAPRITO DAILY — RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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QUESTION PRESENTED FOR REVIEW

Whether or not the decision by the Louisiana Supreme Court in this case affords Full Faith and Credit to previous conflicting decrees on the same subject matter by the Texas Courts?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

LIST OF ALL PARTIES

Petitioners: Joseph T. Caprito and
Marguerite Caprito Dial
Respondents: James C. Mayhew and Helen Vaughan, individually and as Guardian of the person and estate of Gertrude Caprito Daily

REFERENCE TO OPINIONS BELOW

Succession of Caprito, 468 So. 2d 561 (La. 1985), *reversing* 458 So. 2d 588 (La. App. 3d Cir. 1984).

JURISDICTIONAL STATEMENT

The decree sought to be reviewed was rendered by the Supreme Court of the State of Louisiana on May 14, 1985. Petitioners' Application for Rehearing was denied by said Court on June 13, 1985. The statutory provision conferring on this Court jurisdiction to review the decree in question by writ of certiorari is 28 U.S.C. Sec. 1257(3) (1966 & Supp. 1970).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof. U.S. Const., Art. 4, Sec. 1 (Full Faith and Credit Clause)

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, Records and Judicial Proceedings or copies thereof, so authenticated, shall have the same Full Faith and Credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. 28 U.S.C. Sec. 1738 (1966).

STATEMENT OF THE CASE

This is a will contest case. Petitioners attacked the probate of a testament in the succession of Salvador Caprito, Deceased, on jurisdictional, procedural and substantive grounds. After trial before the court, judgment was rendered in favor of Respondents, from which judgment Petitioners appealed.

The Louisiana Third Circuit Court of Appeal, without reaching or deciding Petitioners' procedural and substantive points of error, held that the trial court lacked both domiciliary and ancillary jurisdiction over this succession. Respondents sought, and were granted, review by the Louisiana Supreme Court. After hearing oral argument, said Court by its Opinion and Decree dated May 14, 1985, reversed the appellate court below and remanded the cause thereto for further proceedings consistent with its opinion. Petitioners' Application for Rehearing was denied on June 13, 1985.

Petitioners duly filed their Motion to Dismiss Due to Operation of Full Faith and Credit in the trial court. TR-90-95; 264-265. The trial court denied said Motion, stating in its Judgment that Full Faith and Credit is inapplicable to the instant case, and in its Reasons for Judgment that the "will contest raises questions not before any other court in this nation, and requires this Court to give the citizens before it a determination of the issues presented without deferring to another forum on those issues."

Petitioners complained of the trial court's ruling in their Point of Error One before the Louisiana Third Circuit Court of Appeal. Petitioners' (Appellants') Brief, pages 7-16. The appellate court found in Petitioners' favor on the jurisdictional issue, and Respondents appealed to the Louisiana Supreme Court. Respondents failed to raise the federal question before that Court. However, Petitioners fully addressed the issue in their responsive brief, at Reply Point One, pages 10-19, particularly pages 17-19. The Louisiana Supreme Court, in reversing the appellate court, failed directly to address the federal question before it. Petitioners again urged the issue in their Application for

Rehearing, Point of Error 6, pages 13-23. However, the Louisiana Supreme Court denied the Application for Rehearing, without issuing an opinion.

The foregoing allegations concerning the presentation below of the federal question upon which review is sought is made in compliance with Supreme Court Rule 21(h). Respondents are hereby expressly put on notice thereof, that they may apprise this Court of any dispute as to said allegations in order to avoid the waste of judicial resources encountered by the Court in *Webb v. Webb*, 451 U.S. 493, 68 L. Ed. 2d 392, 101 S. Ct. 1889 (1981) (where petitioner failed properly to raise her claim in state proceedings, writ of certiorari was dismissed for want of jurisdiction).

ARGUMENT

1. Factual Summary. This suit is a will contest concerning the probate of a testament by Salvador Caprito, a/k/a S. Caprito, Deceased. Petitioners, Joseph T. Caprito and Marguerite Caprito Dial, are the nephew and niece of the Deceased. Respondents are Gertrude Caprito Daily (represented by her daughter and duly appointed guardian Helen Vaughan), and James C. Mayhew, the purported daughter and son of the Deceased.

Salvador Caprito was born on December 23, 1883, in Franklin, Louisiana. Pl-5 (Death Certificate). At some time he moved to Fort Worth, Texas. He was living on a 400-acre ranch, seven or eight miles from downtown Fort Worth, Texas, when Mr. William H. McKinney, CPA, first began keeping his books in 1963. Pl-12 (McKinney Deposition), pp. 11-14; TR-170, 217, 218 (James Mayhew).

In 1969 or 1970, the Deceased sold his ranch and moved to Hunter Plaza, a housing facility for elderly people located in downtown Fort Worth. Pl-12 (McKinney Deposition), p. 15. He left Hunter Plaza in 1974 or 1975, and moved to the Blackstone Hotel, also in downtown Fort Worth. Pl-12 (McKinney Deposition), p. 16. Although he made several brief visits to Alabama and to New Orleans, he always returned to Fort Worth, Texas. Pl-12 (McKinney

Deposition), pp. 16-20.

As evidenced by the certificates of deposit, the sale of the Fort Worth ranch, and the entire record, the Deceased acquired a substantial fortune during his lifetime as an oilfield entrepreneur.

On or about January of 1977, the Deceased left the Blackstone Hotel and resided with one or another of the Petitioners, TR-213, 214, 223 (J. T. Caprito); TR-234, 235 (Marguerite Caprito); Pl-12 (McKinney Deposition), pp. 21-22, who housed, clothed, and fed and cared for him. TR-236, 251, 252 (Marguerite Caprito). Mr. Caprito had just previously turned 94 years old. His mail and financial affairs were still being taken care of by Mr. McKinney in Fort Worth. TR-221 (J. T. Caprito); Pl-12 (McKinney Deposition), p. 23. Except for attending guardianship proceedings, the Deceased did not again physically reside in Fort Worth, Texas.

On October 7, 1977, the Deceased executed a Last Will and Testament in Beaumont, Texas (hereinafter sometimes referred to as the Texas will). Said testament recites that Mr. Caprito was "of the County of Tarrant, and State of Texas," and leaves his entire estate to Petitioners. It also recites the testator's intention "to disinherit all and any other person or persons claiming to be heirs of my estate." TR-34-36.

On July 5, 1977, an ex parte temporary guardianship of the person and estate of the Deceased was requested by and granted to Mr. McKinney, by the Probate Court of Tarrant County (Fort Worth), Texas. Pl-2 (Texas Guardianship), pp. 1-5. Adversarial permanent guardianship proceedings took place in December of 1977, in Fort Worth. A jury verdict finding the Deceased to be mentally incompetent to manage his property and financial affairs was returned December 9, 1977. Based upon said verdict, a judgment was signed on January 17, 1978, declaring the Deceased a non compos mentis, and appointing Petitioner Marguerite Caprito Dial as permanent guardian of his person and estate. Pl-2 (Texas Guardianship), pp. 6-9.

Respondents applied for and succeeded in the removal of Mrs. Dial as guardian and in the appointment of Respon-

dent Helen Vaughan as guardian of the person and estate of the Deceased, in May of 1978. Pl-2 (Texas Guardianship), pp. 10-16. Mrs. Vaughan transferred the guardianship venue to Orange County, Texas, in the months of August and September of 1978. Pl-2 (Texas Guardianship), pp. 23-31.

On October 31, 1978 (without notice to Petitioners), TR-141, 142 (Helen Vaughan), Respondent Helen Vaughan resigned as guardian, and Respondent James C. Mayhew was appointed as successor guardian of the person and estate of the Deceased. Pl-2 (Texas Guardianship), pp. 38, 44-47. Upon Mr. Mayhew's application, the estate's certificates of deposit were transferred from an Orange County bank into various financial institutions in the State of Louisiana. Pl-2 (Texas Guardianship), pp. 48-50. By a report on the funds transfer, filed January 17, 1979, Mr. Mayhew described the newly issued certificates of deposit, and filed "safekeeping" receipts with the Orange County Probate Court. Pl-2 (Texas Guardianship), pp. 55-65.

The "safekeeping receipts" provide that the certificates of deposit will not be transferred except upon order of the County Court at Law of Orange County, Texas. Pl-2 (Texas Guardianship), pp. 58-64.

Although Mr. Mayhew now was guardian, Petitioners were not told of this change. Petitioner Dial, who was receiving monthly support payments for the care and support of her uncle pursuant to court order, TR-148-152 (Helen Vaughan); TR-251 (Marguerite Caprito), continued to receive checks drawn against Respondent Helen Vaughan's guardianship account. TR-143-155 (Helen Vaughan); HV-1 through HV-5 (checks). Thus the appearance that Mrs. Vaughan was still the guardian was maintained by Respondents. See also TR-157-158 (Helen Vaughan).

From January, 1977, until January, 1982, testator was cared for principally by Petitioner Dial, in Lake Charles, Louisiana. As he continued to age, his physical and mental condition continued a parallel decline. See, e.g., TR-245-247 (Marguerite Caprito). See generally Pl-6A, B, C, D, E & F (Medical Records of St. Patrick's Hospital). Under the care of Dr. Ordinario in Lake Charles, he was treated

for kidney problems, senile dementia, congestive heart failure, and organic brain syndrome, and underwent several hospital admissions therefor. Pl-7 & Pl-8 (Dr. Ordinario); Pl-6A, B, C, D, E & F (Medical Records of St. Patrick's Hospital).

In December of 1981, he was hospitalized for hip surgery, at the age of 98 years. Pl-6F (Medical Records of St. Patrick's Hospital). Upon his discharge in January, 1982, Mr. Mayhew, with Helen Vaughan's assistance, and without telling or informing either Petitioner, arranged for placement of the Deceased in Hilltop I Nursing Home in Pineville, Rapides Parish, Louisiana. TR-155-157 (Helen Vaughan); TR-174-175 (James Mayhew).

Prior to removing the Deceased to Hilltop, Mr. Mayhew had seen Mr. Caprito only two or three times. Indeed, Mr. Mayhew had neither seen nor otherwise communicated with him for twelve years prior thereto, four years of which he had been the guardian of the person and estate of his purported father. TR-170-172 (James Mayhew). As far as the record shows, Respondent Gertrude Caprito Daily had never seen or communicated with Mr. Caprito. Helen Vaughan visited in Lake Charles a few times, for 20 minutes or so at a time, over this period. TR-161-163, 708-709, 711-712 (Helen Vaughan).

While at Hilltop, the Deceased allegedly executed a purported testament on February 16, 1982 (hereinafter sometimes referred to as the Louisiana will). The Louisiana will left the Deceased's entire estate to Respondents. TR-11-13.

The Deceased died March 9, 1982, in Rapides General Hospital, not quite three weeks after the date of the Louisiana will. Pl-5 (Death Certificate); Pl-10 (Medical Records of Rapides General Hospital).

The Texas will was filed in and probated by the Orange County Probate Court. TR-27-38 (Texas Probate). The Louisiana will was filed in and probated by the court below. TR-4-20 (Louisiana Probate). Respondents have contested the Texas probate proceedings, TR-66-67, and have filed the Louisiana will for probate in Texas. TR-64-65. Petitioners contested the probate of the Louisiana will, both in

Texas, TR-71-73, and in Louisiana, resulting in the proceedings below and the subsequent appeals. Copies of the Texas guardianship and probate proceedings, exemplified as required by 28 U.S.C. Sec. 1738 (1966), were admitted into evidence. Pl-2; admitted, TR-128, lines 12-14.

2. Rule 17 Reasons for Allowing the Writ. This case presents important issues of policy and law concerning the conclusiveness of one state's jurisdictional findings in, and subsequent administration of, guardianship proceedings in which the ward dies while under legal disability. One policy issue raised is whether a state, in which a ward's funds have been invested in safekeeping accounts by order of a sister state court, may reexamine the administering court's ab initio jurisdiction over the ward and/or his property, without regard to well-established principles derived from comity and expressed in the mandate of the Full Faith and Credit Clause. Another policy issue is whether such a reexamination undermines the ability of a court to order interstate investment of its ward's estate. Finally, the decision below results in the destruction of a contract between an administering court and its "trustee" financial institutions, with neither the administering court nor the financial institutions party to the proceedings.

The opinion and decree below also conflict with applicable decisions of this Court. The decision most on point is *Underwriters National Assurance Co. v. North Carolina Life and Accident and Health Insurance Guaranty Ass'n*, 455 U.S. 691, 71 L. Ed. 2d 558, 102 S. Ct. 1357 (1982). Reserving a full discussion of the case for their Brief should the Writ issue, Petitioners herein refer to the salient aspects of *Underwriters*.

1. The constitutional mandate of Full Faith and Credit operates in recognition of the risk of multiple State exercise of power over the same case or controversy, with the uncertainty, confusion, and delay that necessarily accompany relitigation of the same issue.

2. The constitutional mandate requires that the judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced.

3. As a direct result of the principles underlying the Full Faith and Credit Clause, a judgment must be supported by a proper showing of subject matter and personal jurisdiction to be entitled to full faith and credit.

4. Thus the forum state may inquire into the jurisdictional bases underlying the rendering court's action.

5. The forum court's jurisdictional inquiry is limited by the principles of res judicata and jurisdictional finality.

6. On direct review of the forum court's jurisdictional inquiry, Petitioners need allege and show only that the reviewing court erred in its jurisdictional inquiry.

7. The second court's jurisdictional inquiry is limited to the question of whether the initial court fully and fairly considered and finally decided the relevant jurisdictional issues.

8. A party cannot escape the requirements of full faith and credit and res judicata by asserting its own failure to raise matters clearly within the scope of a prior proceeding.

The foregoing well-established principles clearly have not been followed by the Louisiana Supreme Court in the instant case.

Records from the Texas proceedings clearly indicate that the Texas court proceeded as though Mr. Caprito was a Texas domiciliary.

The Texas Probate Code may be divided into four principal segments. The first segment deals with general provisions, relating to definitions, internal court procedures and notices, jurisdictional divisions amongst the various probate courts, and venue. The second segment deals with estates of decedents. This segment may be further subdivided into intestate and testamentary successions. The third segment concerns guardianships of the person and/or estates of minors and incompetents. The final segment governs the appointment, qualification, powers and duties of personal representatives generally. Numerous other sections relate to homestead exemptions, non-testamentary transfers, etc.

1. A first and basic distinction must be made between the residence of the deceased person or of the ward, versus

the residence of the personal representative.

Texas law allows the appointment of a succession representative who is a non-resident of Texas, provided that the representative files with the court an appointment of a resident agent to accept service of process. T.P.C. Sec. 78(d). The same rule applies to guardians who are not Texas residents. T.P.C. Secs. 108, 110, 222; *Ramires v. Garcia deBretado*, 547 S.W.2 717 (Tex. Civ. App. – El Paso, 1977). Louisiana has a similar provision. La. C. Civ. P. art. 4273.

The residence or non-residence of the guardian has no bearing upon the subject matter jurisdictional question concerning the domicile of the ward at the time of the institution of the guardianship proceedings.

2. A second, basic determination must be made as to the type of guardianship. The Texas Probate Code consistently differentiates between three types of guardianships:

a. Guardian of the person;

b. Guardian of the estate;

c. Guardian of the person and estate.

For instance, the application for guardianship must specify the type of guardianship sought. T.P.C. Sec. 111(f). Qualification requires a type of bond for a guardian of the person, T.P.C. Sec. 193, that differs from the bond of a guardian of the estate, T.P.C. Sec. 194. When the guardianship is of both the person and estate, only one bond is required. T.P.C. Sec. 194(14). The rights and duties of guardians of the person, T.P.C. Sec. 229, are set forth distinctly from the rights and duties of guardians of the estates of wards. T.P.C. Sec. 230(b). Guardians of both the person and estate have all the rights and duties of both types of guardians. T.P.C. Sec. 231. Finally, guardians of the person alone are entitled to no compensation, whereas the other two types of guardians are entitled to a prescribed compensation, T.P.C. Sec. 241(b), and for certain expenses incurred pertaining to administration of the estate. T.P.C. Sec. 242.

Louisiana law also makes provisions for separate tutors and curators of the property and person of the minor or interdict. La. C. Civ. P. arts. 4069 & 4550. In Louisiana only a bank may be a separate tutor or curator of property.

The Texas Probate Code differences between types of guardianships not only serve functional, administrative purposes, but also reflect a more basic jurisdictional notion relating to ancillary guardianships, as is discussed in the next section hereof.

3. The third and final determination to be made is the domicile of the ward at the time of the institution of the guardianship proceedings.

Texas law follows the uniform practice of distinguishing between domiciliaries and nondomiciliaries.

For instance, Texas Probate Code, Chapter V., Probate, Grant of Administration, and Guardianship, Part 2, is entitled "Procedure Pertaining to Foreign Wills." A "foreign will" is the written will of a testator who was not domiciled in Texas at the time of his death. T.P.C. Sec. 95(a).

Appropriate weight is given to the source of probate in a proceeding to probate in Texas a foreign will. Wills probated in the domiciliary jurisdiction are entitled to probate forthwith upon application therefor, without citation, notice or court order. T.P.C. Sec. 95(b)(1), (d)(1). On the other hand, wills probated in a nondomiciliary jurisdiction must follow basically the same procedures required for the probate of a domestic will. T.P.C. Sec. 95(b)(2), (d)(2).

The distinction is fundamental. For instance, if a section 95(b)(1) (domiciliary jurisdiction) procedure is used, and it is later proved that in fact the probate was by a non-domiciliary jurisdiction, section 95(b)(2), the probate must be set aside. T.P.C. Sec. 95(f). More importantly, the grounds for contest differ. T.P.C. Sec. 100. Conclusive weight is given to the acceptance or rejection for probate of a will offered in the domiciliary jurisdiction. T.P.C. Secs. 100(a), 102. Foreign wills probated in a non-domiciliary jurisdiction may be contested on all of the same grounds upon which a contest of a domestic will may be based. T.P.C. Sec. 100(b).

Foreign wills may also be offered for original probate in Texas. T.P.C. Sec. 103. However, in addition to being subject to contest as would be the probate of a domestic will, original probate in Texas may be delayed pending pro-

bate proceedings or contests thereof in the domiciliary jurisdiction. T.P.C. Sec. 103.

The distinction based upon residency is carried over into the guardianship procedures. It is here that the previous two inquiries become readily apparent. Those inquiries called for the following two distinctions to be made:

a. Residence of the ward versus residence of the guardian;
b. Which of the three types of guardianships is involved.

Only four sections govern the appointment of guardians respecting wards who do not reside in Texas. T.P.C. Secs. 124, 125, 126 & 127. These sections reveal this fundamental notion:

Texas guardianship jurisdiction and procedure provides only for guardians of the estate (and not for guardians of the person or of the person and estate) of non-resident wards.

A non-resident guardian *of the estate*, who has previously been appointed by a foreign court in who's jurisdiction the ward is situated, may be qualified in Texas as guardian of the estate situated in Texas owned by the non-resident ward. T.P.C. Sec. 124(a). Louisiana provides for a similar procedure regarding qualification in Louisiana of a foreign curator. La. C. Civ. P. arts. 4433 & 4554.

When there is no guardianship pursuant to domiciliary jurisdiction proceedings, an original domestic guardianship *of the estate* situated in Texas owned by the non-resident ward may be opened. T.P.C. Sec. 124(b). Should a non-resident guardian of the estate later qualify, however, the resident guardianship must be closed. *Id.*

Finally, a procedure is established for removing the ward's personal property from the state. Creditors are protected to a limited extent. T.P.C. Sec. 126. Louisiana has a similar procedure. La. C. Civ. P. art. 4432.

Section 124(b) itself indicates the jurisdictional predicate for guardianship of the person or of the person and estate. That subsection provides that the court shall take such actions and make all orders *respecting the estate* "in like manner *as if* the ward *were* a resident of this State

and guardianship of *the person and estate* of the ward *had been* granted by said court, and the ward *had been sent abroad* by the court for education or treatment." *Id.* (emphasis added). Notably, the court's jurisdiction is limited to the estate, and does not extend to the person, of the ward.

No provision of Texas law allows the original domestic appointment of a guardian of the person, or of the person and estate, of a non-resident ward. Indeed, the court in *Redmon v. Leach*, 130 S.W.2 873 (Tex. Civ. App. – Dallas, 1939), writ denied, judgment correct, stated that the Texas courts did not and could not have jurisdiction to determine the status, relating to unsoundness of mind, of a non-resident. The *Redmon* court was construing V.A.T.S. article 4132, now embodied as section 124(b) of the Texas Probate Code, and articles 4285 through 4289, now Probate Code sections 124, 125, 126 and 127.

Redmon went so far as to preclude Texas courts from incidentally determining a non-resident's status for the limited purpose of appointing a domestic guardian of the non-resident person's property situated in Texas. Subsequent decisions have eroded that position, and have upheld the validity of Section 124(b). *In re Burges' Estate*, 148 S.W.2 903 (Tex. Civ. App. – San Antonio, 1941), no writ; *Henderson v. Shell Oil Co.*, 202 S.W.2 492 (Tex. Civ. App. – Fort Worth, 1947), *aff'd*, 208 S.W.2 863 (Tex. 1948).

These later decisions disapproved of that portion of *Redmon* which required a status adjudication by the domiciliary jurisdiction prior to the appointment of a domestic guardian *of the estate* of the non-resident person situated in Texas.

> A proceeding to commit an insane person, or to appoint a guardian *of his person*, is a proceeding in personam, but a proceeding to appoint a guardian *of the estate* of a non-resident is primarily a proceeding in rem, jurisdiction of which depends not on the residence of the insane person but on the location of the property.

> A rule that would require the Texas court to refrain from assuming control of the property lying within its jurisdiction until a Missouri court had declared the property owner insane would impair, or could even defeat entirely, the exercise of jurisdiction by the Texas court. Missouri might never take any action with respect to the question of (the owner's) insanity, ...

202 S.W.2 at 495-96 (emphasis added). All of the cases reflect, however, the basic assumption that Texas courts do not have and cannot be given jurisdiction to appoint a guardian of the person of a non-domiciliary.

4. Application of the foregoing principles to the facts of the instant case compels the conclusion that the Texas probate courts found the Deceased to be a Texas domiciliary at the time of the institution of the guardianship proceedings. The order appointing Plaintiff Marguerite Caprito Alexander Dial permanent guardian of the person and estate of Mr. Caprito amply supports this conclusion. Pl-2 (Texas Guardianship), pp. 6-7.

First, Judge Burnett struck a phrase reciting that Mr. Caprito was a non-resident. Second, the court struck an express reference to section 124(b). Third, no finding of Ms. Dial's prior appointment in another state was made; hence section 124(a) is inapplicable. Fourth, the ward's nonresidence is a predicate to the applicability of section 124, (a) or (b). By striking the finding of nonresidence, the court eliminated section 124 as a possible foundation for its order. Fifth, the guardianship is one of the estate *and person*. Because the regularity and jurisdictional validity of a judgment rendered by a court of a sister state is presumed, absent defects apparent on the face of the proceedings, it is presumed that the court made a jurisdictional finding of the ward's domicile being in Tarrant County, Texas. Sixth, the order expressly recites a finding of jurisdiction and venue; thus the presumption of regularity is further strengthened. A judgment expressly finding jurisdiction to order a guardian of the person, or of the person and estate, is a judgment implicitly and compellingly finding the underlying jurisdictional prerequisite

that the ward's domicile was in Tarrant County, State of Texas.

The subsequent Texas guardianship and probate proceedings of record indicate a continuous, unbroken line of jurisdictional findings emanating from and identical to the December, 1977, permanent guardianship order. The guardianship proceedings filed prior to Mr. Caprito's death were, of course, prepared mostly at the instance of one or more of the Respondents. Upon his death, the probate court based its jurisdiction over the estate (which at the time consisted of CD's purchased from Louisiana financial institutions pursuant to the court's order, and the safekeeping agreements), upon an express finding of a Texas domicile of the Deceased at the time of death. TR-29.

A finding by the Louisiana judiciary that the Deceased was a Louisiana domiciliary is an impermissible collateral attack on the Texas decrees, and denies the decrees Full Faith and Credit.

Plaintiffs duly filed their Motion to Dismiss Due to Operation of Full Faith and Credit. TR-90-95; 264-265. Defendants' Amended Answer alleges that the Deceased was a Louisiana domiciliary "sometime in 1977 and remained such until his death." TR-76. Filed in this cause and admitted into evidence are copies of Texas guardianship proceedings and succession proceedings. P-2; admitted, TR-128, lines 12-14. These copies have been certified and exemplified in the manner specified by the laws of the United States. 28 U.S.C. Sec. 1738. The Texas orders all contain express recitations that the rendering court had jurisdiction and venue of the person and estate of the Deceased.

The Louisiana Supreme Court held that at the time of his death, Salvador Caprito was a Louisiana domiciliary. 468 So. 2d at 564. The Court's opinion leaves little doubt that the Court also found him to have established a Louisiana domicile in 1977 prior to the institution of the Texas guardianship proceedings. *Id.* However, the appellate court, in finding that the Deceased had established a Texas domicile when he was placed under guardianship, aptly noted that to find otherwise would be to permit an

impermissible collateral attack on the Texas decree, and deny same Full Faith and Credit. 458 So. 2d 588, 591. The intermediate court also noted without further comment Respondents' full participation in the Texas proceedings. *Id.* The Third Circuit also recognized the Texas probate court's continuing jurisdiction over the assets of the estate due to said safekeeping receipts.

CONCLUSION

1. The Deceased was found incompetent by an adversarial proceeding in Fort Worth, Texas, in 1977.

2. In 1978, Respondent Vaughan successfully contested petitioner Marguerite Caprito Dial's priority of appointment as guardian of the person and estate of the Deceased in the Texas probate court.

3. In 1978, Respondent Vaughan petitioned for and was appointed guardian of the person and estate of the Deceased, and posted bond with and made accountings to the Texas probate court.

4. In 1978, Respondent Vaughan successfully transferred the venue of the guardianship proceedings to Orange, Texas.

5. In 1978, Respondent Mayhew petitioned for and was appointed guardian of the person and estate of the Deceased by the Orange, Texas, probate court.

6. Subsequent to his appointment, Respondent Mayhew filed accountings, reports, receipts and bonds with the Orange, Texas, probate court.

7. Neither Respondent ever challenged the jurisdiction of the court system which had cloaked them with the office of guardian, at their instance, during the Deceased's lifetime.

8. The ward's assets were invested in Louisiana only at Respondent Mayhew's request, upon his posting of proper bond and safekeeping receipts, by order of the Orange, Texas, probate court.

9. Every order or judgment by the Texas courts, from the 1977 institution of guardianship proceedings, through

the order admitting the Texas will to probate, contains express findings of jurisdiction and venue in the cause.

10. Respondents presently are seeking to admit the Louisiana will to probate in Orange, Texas, and are challenging the probate of the Texas will, in a court which Respondents claim has and had no jurisdiction over either the ward or his estate.

11. Full Faith and Credit, operating through the doctrine of jurisdictional finality pursuant to principles of res judicata, requires that Respondents not be permitted to collaterally attack the jurisdiction of the Texas courts, invoked by them so freely, fully, and frequently during the lifetime of the now-deceased ward.

12. The Texas probate court should be permitted to proceed with the orderly disposition of the parties' claims to the estate of its deceased ward, unhindered by collateral attacks on its jurisdiction by the very persons to whom it had entrusted, upon petition, the office of guardian of the estate in dispute.

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that the Court issue a Writ of Certiorari to the Louisiana Supreme Court, and for general relief.

Respectfully submitted,

SANDERS AND OWENS, P.C.

BY: _____

PANNAL ALAN SANDERS
P. O. Box 519
Orange, Texas 77630
409/883-7495

ATTORNEY FOR PETITIONERS

and

Dorman and Dunaway

BY: _____

JAMES R. DUNAWAY
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RECORD COUNSEL
FOR PETITIONERS

My name is JAMES R. DUNAWAY. I am duly authorized and licensed to practice law before the United States Supreme Court. I am record counsel in the foregoing case, on behalf of Petitioners. I hereby certify that pursuant to Rule 28, copies of the foregoing Petition for Writ of Certiorari have been served to the following persons:

OFFICE OF THE CLERK
UNITED STATES SUPREME COURT
WASHINGTON, D. C. 20543

MR. GUY HUMPHRIES, JR.
MR. EARL HUMPHRIES
P. O. BOX 1769
1026 EIGHTH STREET
ALEXANDRIA, LOUISIANA 71309
(318) 448-1412

Said service was made by mailing to said persons true and correct copies of said Petition, via first-class mail, postage prepaid, addressed as shown above, certified mail, return receipt requested, by depositing same in a United States post office or mailbox, on the 11th day of September, 1985.

JAMES R. DUNAWAY

SUCCESSION OF Salvador CAPRITO
a/k/a S. Caprito.

No. 84—C—2180.

Supreme Court of Louisiana.

May 14, 1985.

Rehearing Denied June 13, 1985.

Niece and nephew of testator filed action in succession proceedings to annul probated will. After trial on the merits, the 9th Judicial District Court, Parish of Rapides, Alfred A. Mansour, J., dismissed annulment action, and nephew and niece appealed. The Court of Appeal reversed, 458 So. 2d 588, finding that Louisiana lacked jurisdiction. Testator's children sought writ of certiorari. The Supreme Court, Marcus, J., held that evidence established that testator had sufficient mental capacity to change domicile from Texas to Louisiana, so that trial court had jurisdiction to probate will.

Judgment of Court of Appeal reversed; case remanded to that court.

Dennis, J., concurs with reasons.

Lemmon, J., concurs and will assign reasons

G. Earl Humphries, III, Guy Humphries, Jr., Humphries & Humphries, Alexandria, for applicant.

Pannal Alan Sanders, Lynwood Sanders, Sanders & Owens, Orange, for respondent.

MARCUS, Justice.

This litigation involves an action to annul the probated testament of Salvador Caprito filed by his niece and nephew, Marguerite Caprito Dial and J. T. Caprito, against his children, James C. Mayhew and Gertrude Caprito Daily. Gertrude Caprito Daily is represented by her guardian and daughter, Helen Vaughan.

Caprito was born in Franklin, Louisiana on December 23, 1883. He married Annie Erhardt on April 18, 1912, and they divorced December 14, 1915. Caprito was awarded

legal custody of the daughter, Gertrude; a son, Noel Caprito, was born after the divorce. Noel uses the name of his stepfather and is referred to as James Mayhew.

After the divorce, Caprito had no contact with his children or other relatives in Louisiana until very late in his life. His whereabouts were unknown until about 1955. He was apparently quite successful as an oil-field entrepreneur, and from at least 1955 until 1977 he lived and conducted business in Fort Worth, Texas. He was living on a large ranch outside of Fort Worth when William McKinney, an accountant, began to keep his books in 1963. According to McKinney, Caprito sold the ranch in 1969 and moved to Hunter Plaza, an apartment facility for the elderly located in Fort Worth. He left Hunter Plaza in 1974 or 1975 and moved to the Blackstone Hotel in Fort Worth. Despite Caprito's substantial fortune, he acquired few personal belongings and from the sale of his ranch until his death he lived out of one suitcase. He donated large amounts of money to individuals and charities.

In January or February of 1977, Caprito left Fort Worth and went to stay with his nephew, J. T. Caprito, in Franklin, Louisiana. Shortly thereafter, McKinney instituted guardianship proceedings in Tarrant County, Texas. McKinney was appointed temporary guardian over Caprito's person and estate on July 5, 1977. Although McKinney had been handling Caprito's financial affairs for some time, he testified that Caprito continued to write his own checks even after the temporary guardianship was instituted. In late 1977, a Tarrant County jury found that Caprito was incompetent to manage his property and financial affairs and Marguerite Caprito Alexander (now known as Marguerite Caprito Dial) was appointed permanent guardian over his person and estate. Caprito then went to live with Marguerite in Lake Charles, Louisiana. She was paid $891 per month, later increased to $956, to care for him.

Helen Vaughan, Caprito's granddaughter, replaced Marguerite as permanent guardian on June 7, 1978. She obtained a transfer of the estate and guardianship proceedings to Orange County, Texas. Helen Vaughan re-

signed as guardian on October 31, 1978 and James Mayhew was appointed as successor guardian. Mayhew secured an order from the Orange County court allowing him to transfer the funds of Caprito's estate, which comprised certificates of deposit totaling about $280,000, to Louisiana banks. He filed safekeeping receipts with the Texas court which provided that the funds would not be released without order of the Orange County court. Mayhew subsequently obtained the Texas court's permission to enter into various transactions with the funds.

In December of 1981, while still living with Marguerite in Lake Charles, Caprito fell and broke his hip. He was hospitalized for hip surgery and upon his recovery Mayhew placed him in Hilltop I nursing home in Mayhew's home town of Pineville, Louisiana in Rapides Parish. Caprito remained at Hilltop from January 1982, until early March 1982. He executed a statutory will on February 16, 1982, which left his entire estate to his children, James Mayhew and Gertrude Caprito Daily, and revoked all prior wills. Caprito, age 98, died March 9, 1982, at Rapides General Hospital in Alexandria.

Mayhew and Daily filed a petition on March 17, 1982 in the district court in Rapides Parish to probate the statutory will executed by Caprito while at Hilltop. The will was duly probated, and subsequently Caprito's children were placed in possession of the estate. Thereafter, J. T. Caprito and Marguerite Caprito Dial (nephew and niece) filed an action in the succession proceedings to annul the probated testament on the grounds that Louisiana lacked jurisdiction over Caprito's succession, the form of the will was invalid and Caprito lacked the mental capacity to make the will.[1] After trial on the merits, the court dismissed the action to annul the probated will, finding that Louisiana had jurisdiction over the succession, the will was valid in form and Caprito had the requisite mental capacity to execute the will. The court of appeal reversed, finding that Louisiana lacked jurisdiction over Caprito's succession.[2] It did not address the will's validity or Caprito's capacity. We granted certiorari to review the correctness of that decision.[3]

Jurisdiction over succession proceedings is determined by La. Code Civ. P. art. 2811, which provides:

A proceeding to open a succession shall be brought in the *district court of the parish where the deceased was domiciled at the time of his death.*

If the deceased was not domiciled in this state at the time of his death, his succession may be opened in the district court of any parish where:

1. Immovable property of the deceased is situated; or,

2. Movable property of the deceased is situated, if he owned no immovable property in the state at the time of his death. (Emphasis added.)

After review of the record, we find that Caprito established a domicile in Texas from at least 1955 until 1977. If, however, Caprito was domiciled in Louisiana at the time of his death, then the succession was properly brought in Louisiana pursuant to La. Code Civ. P. art. 2811. Thus, the issue is whether Caprito changed his domicile from Texas to Louisiana.[4]

A change of domicile from one parish to another is produced by the act of residing in another parish, combined with the intention of making one's principal establishment there. La. Civ. Code art. 41. This intention is proved by an express declaration of it before the recorders of the parishes, from which and to which he shall intend to remove. This declaration is made in writing, is signed by the party making it, and registered by the recorder. *Id.* art. 42. In case this declaration is not made, the proof of this intention shall depend upon circumstances. *Id.* art. 43. The question of domicile is one of intention as well as fact, and where it appears that a domicile has been acquired in another state, the parties seeking to show that it has been changed to this state must overcome the legal presumption that it has not been changed by positive and satisfactory proof of the establishment of a domicile here as a matter of fact with the intention of remaining here and of abandoning the former domicile. *Walcup v. Honish*, 210 La. 843, 28 So. 2d 452 (1946); *First National Bank of Lumberton, Miss. v. Hinton*, 123 La. 1018, 49 So. 692 (1909). Where an interdict has sufficient mentality to do

so, he can acquire a domicile in another state. *Interdiction of Gasquet*, 147 La. 722, 85 So. 884 (1920).

When Caprito came to live in Louisiana, he established residence in the state. The facts must be scrutinized to determine whether he intended to remain in Louisiana. Caprito came to Louisiana in early 1977 of his own accord; Marguerite Caprito Dial testified at the Texas guardianship proceedings that he was not sent for. Most of his known relatives lived in Louisiana and he himself was born in Louisiana. At the guardianship proceedings in December of 1977, Caprito testified that his "home" was in Franklin, Louisiana, where his parents were buried. When asked where he intended to spend his final days, he replied, "I'm going to die in Franklin." Caprito brought all of his personal belongings with him when he came to Louisiana in 1977, and he continued to reside in the state from 1977 until his death in 1982. He returned to Texas only twice during that time, once to appear at the guardianship proceedings. His guardian, Mayhew, transferred all of his personal funds to Louisiana banks. Mayhew testified at trial that he planned for his father to remain in Rapides Parish. The strongest evidence of Caprito's intent to establish a domicile in Louisiana, and specifically in Rapides Parish, is found in the statutory will he executed before a notary and three witnesses on February 16, 1982: "I, S. Caprito (Salvador Caprito), a citizen and resident and *domiciled in the Parish of Rapides, State of Louisiana* . . ."[5] (Emphasis added.)

Without passing on Caprito's mental capacity to execute the will, we find that Caprito had sufficient mentality to form the intent to acquire a domicile in Louisiana. *Gasquet, supra*. Defendants, James Mayhew and Gertrude Caprito Daily, established by positive and satisfactory proof that Caprito intended to abandon his Texas domicile and establish a new domicile in Louisiana. They further proved that the Louisiana domicile was in Rapides Parish where the succession proceedings were brought. Thus, defendants overcame the legal presumption that Caprito's domicile had not been changed.[6] Having concluded that Caprito was domiciled in Louisiana at the time of his death, the pro-

bated will is not null for lack of jurisdiction. As the court of appeal did not reach the issues involving the validity of the will and Caprito's mental capacity to execute the will, we consider it more appropriate to remand the case to that court for review of these issues.

DECREE

The decision of the court of appeal is reversed. The case is remanded to the court of appeal for further proceedings consistent with the views herein expressed.

DENNIS, J., concurs with reasons.

LEMMON, J., concurs and will assign reasons.

OPINION NOTES

1. J. T. and Marguerite had previously petitioned to probate in Orange County, Texas, a will executed by Caprito on October 7, 1977, which left the entire estate to them.
2. 458 So. 2d 588 (La. App. 3d Cir. 1984).
3. 462 So. 2d 1242 (La. 1985).
4. Caprito's children also argued that he was domiciled in Louisiana by virtue of La. Civ. Code art. 39 and that the presence of his movable property in the state conferred jurisdiction pursuant to La. Code Civ. P. art. 2811(2). Because we find that Caprito was domiciled in Louisiana at the time of his death, we need not reach these arguments.
5. The will executed in Texas on October 7, 1977, did not specify Caprito's domicile. It stated that he was "of" Tarrant County, Texas.
6. Plaintiffs aver that the Texas court exercised jurisdiction over Caprito's person and estate by virtue of the guardianship proceedings, and that it retained jurisdiction over his estate when he died because the guardianship was never transferred to Louisiana. They argue that the guardian, Mayhew, could not change Caprito's domicile without permission from the Texas

court. We find no substance to plaintiffs' position. Mayhew did not seek to change Caprito's domicile; Caprito came to Louisiana of his own accord before he was adjudged an incompetent. Moreover, as stated above, Caprito had sufficient mentality to form the intent to acquire a domicile in Louisiana, *Gasquet, supra*, and he did so.

SUPREME COURT OF LOUISIANA

New Orleans, 70112

FOR IMMEDIATE NEWS RELEASE
NEWS RELEASE #81

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 13th day of June, 1985, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

REHEARINGS DENIED:

84-C-2180 Succession of Salvador Caprito, a/k/a S. Caprito

SUCCESSION OF Salvador CAPRITO.

No. 83—929.

Court of Appeal of Louisiana,
Third Circuit.

Oct. 10, 1984.

Rehearing Denied Nov. 26, 1984.

Writ Granted Jan. 25, 1985.

Pretrial motions were made objecting to jurisdiction and venue of Louisiana court in succession proceedings. The 9th Judicial District Court, Parish of Rapides, Alfred A. Mansour, J., denied the motions and considered merits of case. On appeal, the Court of Appeal, Stoker, J., held that: (1) decedent established a domicile in Texas, and did not change it to Louisiana, and therefore Louisiana courts lacked jurisdiction, and (2) that some of decedent's personal property was located in Louisiana did not provide Louisiana courts with jurisdiction to open his succession, where that property, funds from sale of certificates of deposit in Texas banks reinvested in Louisiana banks, was in Louisiana only through permission of Texas court to decedent's nonresident guardian.

Reversed and rendered.

Sanders & Owens, Pannal Alan Sanders and Lynwood Sanders, Orange, Tex., for plaintiff-appellant.

Humphries & Humphries, Guy E. Humphries, Jr. and G. Earl Humphries, III, Alexandria, for defendant-appellee.

Before FORET, STOKER and KNOLL, JJ.

STOKER, Judge.

This is a dispute over the estate of Salvador Caprito, who died on March 9, 1982, at the age of ninety-eight. The dispute is between Mr. Caprito's children, James C. Mayhew, a/k/a Noel Caprito, and Gertrude Caprito Daily, and his niece and nephew, Marguerite Caprito Dial and J. T. Caprito. Gertrude is represented by her guardian and daughter, Helen Vaughan.

FACTS

Mr. Caprito was born on December 23, 1883, in Franklin, Louisiana. He married Annie Ehrhardt on April 18, 1912, and they were divorced on December 14, 1915. One child of the marriage, Gertrude, was born before the divorce, and another, Noel Caprito, was born after the divorce on August 17, 1916. Apparently, Noel has used the name of his mother's second husband for most of his life, and for purposes of clarity we will refer to him in this opinion as Mr. Mayhew.

Neither Mr. Caprito's children nor his niece and nephew had contact with him until quite late in his life. Very little is known about Mr. Caprito's whereabouts after his divorce, but it appears that he lived and conducted his business in Fort Worth, Texas, from at least 1955 until early 1977, just before his long-time friend and accountant, William McKinney, instituted guardianship proceedings in Tarrant County, Texas, in which Fort Worth is located.

According to Mr. McKinney, Mr. Caprito lived on a ranch in Tarrant County from around 1955 until he sold it in 1969. At that time, Mr. Caprito moved into a high-rise apartment building for the elderly in Fort Worth where he remained until 1974 or 1975. After staying a short time with relatives in Alabama, he then moved into a hotel also in Fort Worth where he remained until early in 1977.

During his lifetime Mr. Caprito amassed a substantial fortune as an oilfield entrepreneur. Despite this fact, he apparently acquired very little personal property, but instead donated large amounts of money to individuals and charities. From the time he sold his ranch until his death, Mr. Caprito literally lived "out of a suitcase." A short time prior to institution of the guardianship proceedings, substantially all of Mr. Caprito's assets were converted to certificates of deposit in a Fort Worth bank.

Sometime in February, 1977, Mr. Caprito went to Franklin, Louisiana, to stay with his nephew, J. T. Caprito. By proceedings instituted in Tarrant County, Texas, Mr. McKinney was appointed temporary guardian over the person and estate of Mr. Caprito on July 5, 1977. Near the

end of 1977, Mr. Caprito went to Lake Charles, Louisiana, to stay with his niece, Marguerite Caprito Dial. On January 17, 1978, Mr. Caprito was declared incompetent by the Texas court, and Marguerite was named his permanent guardian.

Mr. Caprito remained in Marguerite's home until December of 1981, when he fell and broke his hip. She was paid $891 per month, later increased to $961, to care for him. During that time, his guardianship changed twice. On June 7, 1978, his granddaughter, Helen Vaughan, replaced Marguerite as permanent guardian. During her term, Helen applied for and obtained an order from the Tarrant County court to transfer the certificates of deposit to a bank in Orange County, Texas, her place of domicile. She also obtained an order transferring the entire guardianship proceeding to Orange County. Helen resigned after a short time, and Mr. Mayhew was named permanent guardian on November 14, 1978. On December 15, 1978, Mr. Mayhew obtained an order from the Orange County court permitting him to cash in the Texas certificates of deposit and buy new ones in the State of Louisiana, primarily in banks in Rapides Parish. The guardianship proceedings remained in the Orange County court.

After Mr. Caprito's hospitalization in Lake Charles for hip surgery in December, 1981, Mr. Mayhew made arrangements for him to be placed in the Hilltop I Nursing Home in Pineville, Louisiana, where Mr. Mayhew lived. Mr. Caprito was admitted to Hilltop on January 7, 1982, where he remained until his final illness. He died on March 9, 1982, at the Rapides General Hospital in Alexandria, Louisiana.

On March 17, 1982, Mr. Mayhew and Helen Vaughan, representing her mother, filed a petition in Rapides Parish to probate a statutory will executed by Mr. Caprito on February 16, 1982, during his stay at Hilltop, leaving his entire estate to his children. (The cities of Pineville and Alexandria are located in Rapides Parish.) The order for probate was signed on March 17, and the judgment of recognition and possession was signed on March 26. Plaintiffs, J. T. Caprito and Marguerite Caprito Dial, filed a petition

to annul the probated testament on May 17, 1982.

In the meantime, also on March 17, 1982, J. T. and Marguerite had filed for probate in Orange County, Texas, a will executed by Mr. Caprito on October 7, 1977, leaving his entire estate to them. As to the proceedings in Louisiana, plaintiffs filed a number of pretrial motions objecting to the jurisdiction and venue of the Louisiana court. These motions were denied and the Louisiana court considered the merits of the case. As to the merits, plaintiffs argue that the statutory will formalities were not met in the execution of the Louisiana will, that Mr. Caprito lacked the mental capacity to make a will, and that the procedural requirements for opening a succession were not met. Because we find that Louisiana did not have jurisdiction over Mr. Caprito's estate, and the presence of his movable property in Rapides Parish did not establish venue there, we do not reach the merits of plaintiffs' other claims.

ISSUES

In support of their position that the succession was properly opened in Rapides Parish, Louisiana, defendants rely on LSA—C.C.P. art. 2811 which provides:

"A proceeding to open a succession shall be brought in the district court of the parish where the deceased was domiciled at the time of his death.

"If the deceased was not domiciled in this state at the time of his death, his succession may be opened in the district court of any parish where:

(1) Immovable property of the deceased is situated; or,

(2) Movable property of the deceased is situated, if he owned no immovable property in the state at the time of his death."

In succession proceedings venue is jurisdictional and cannot be waived. *Succession of McElwee*, 276 So. 2d 391 (La. App. 2d Cir. 1973); LSA—C.C.P. arts. 44 and 2811. Defendants argue that Mr. Caprito was domiciled in Rapides Parish at the time of his death. Alternatively, they argue that if Mr. Caprito was a nonresident of this State, the succession was properly opened in Rapides Parish by virtue of the location of some of his movable property there. We will consider these arguments separately.

DOMICILE

Defendants assert that plaintiffs failed to establish that Mr. Caprito was ever domiciled in Texas, and that the Texas guardianship proceedings were conducted as though Mr. Caprito was a nonresident. This is clearly not the case. Records from the Texas proceedings entered into evidence in this matter before us clearly indicate that the Texas Court proceeded as though Mr. Caprito was a domiciliary of that state. In fact, in some pleadings the Texas judge specifically deleted references to Mr. Caprito as a nonresident.

Despite the scarcity of facts regarding Mr. Caprito's activities prior to 1977, we find that he did establish a domicile in Texas by virtue of his having owned a ranch there and residing there for, what seems to have been for him, a regular basis. To find otherwise would be to permit a collateral attack on the Texas decree. Such an attack may not be made unless the party seeking to deny full faith and credit to the decree shows that it could be collaterally attacked in the initial court. *Didier v. Didier*, 230 So. 2d 436 (La. App. 1st Cir. 1969), writ refused, 255 La. 806, 233 So. 2d 248 (1970). We also note that defendants participated in the Texas court proceedings without objection, even seeking and obtaining rulings for themselves.

Having determined that Mr. Caprito was domiciled in Texas when he was placed under guardianship, we must now decide whether his domicile was changed to Louisiana. The party seeking to show a change in domicile must produce sufficient evidence so that no reasonable doubt remains as to the intent to abandon the old and create a new domicile. *Succession of Barger*, 217 So. 2d 779 (La. App. 4th Cir. 1969), writ refused, 253 La. 877, 220 So. 2d 459 (La. 1969). The facts of this case are somewhat similar to those before the court in *Barger*. Mrs. Barger owned a home in Ascension Parish where she lived until January 4, 1967. She left at that time to stay with a friend in New Orleans. She moved into a nursing home in Jefferson Parish on May 16, 1967, where she resided until her death on February 1, 1968. Mrs. Barger kept her home in Ascen-

sion Parish even though she was not able to return to it due to her poor health. The court in *Barger* found that there had not been a change of domicile.

During the last several years of his life, Mr. Caprito suffered from a number of diseases, including kidney infection, organic brain syndrome and congestive heart failure. He required almost total care during his stay with Marguerite, and was bedridden while he was in the nursing home. While it is true that Mr. Caprito brought all of his personal effects with him to Marguerite's house and, subsequently, to the nursing home, we do not find that sufficient to show a change in domicile. After selling his ranch, Mr. Caprito apparently lived almost as a transient, keeping everything in his suitcase. It is clear from the record that his change of residence was brought about due to health reasons rather than an intent to change his domicile. From these facts, we cannot say that it has been shown beyond a reasonable doubt that Mr. Caprito's domicile was changed.

Defendants also argue that Mr. Caprito could be found to have had his domicile in Rapides Parish by virtue of LSA—C.C. art. 39 which provides that "a person of full age, under interdiction, has his domicile with his curator." We do not agree that this Louisiana provision is applicable to Mr. Caprito's situation, because Texas has established and maintained its jurisdiction in this matter.

In appointing a guardian for the person and estate of Mr. Caprito, the Texas court exercised full jurisdiction over him. Mr. Mayhew was clearly appointed as a nonresident guardian who was required to designate an agent for service of process in Texas. Thus, the Texas court retained its jurisdiction over Mr. Caprito's person and estate.

Defendants cite a number of cases in support of their position that Mr. Caprito's domicile was that of Mr. Mayhew, but we do not find those authorities persuasive. In the cited cases the guardian was found to have authority to change the domicile of the ward either by virtue of the nature of the guardianship or, in one case, by specific permission of the court. Mr. Mayhew availed himself of Texas law in seeking to be appointed the guardian of Mr. Caprito

and has never sought the Texas court's permission for a change in the domicile of Mr. Caprito. After being appointed guardian, Mr. Mayhew continued to seek the permission of the Texas court in his dealings with Mr. Caprito's property. Under the circumstances, we cannot find that Mr. Mayhew had authority to change Mr. Caprito's domicile merely by placing him in a nursing home in Rapides Parish. See 25 Am. Jr. 2nd Domicil, secs. 82-83.

LOCATION OF MOVABLE

We determined in the previous discussion that Mr. Caprito remained domiciled in Texas, thus, Rapides Parish does not have jurisdiction to open his succession on the basis of his domicile. Defendants argue alternatively that Rapides Parish has jurisdiction over the succession by virtue of the location of some of Mr. Caprito's movable property in that parish. We do not find that the circumstances under which Mr. Caprito's property came to be located in Rapides Parish warrant the exercise of that parish's jurisdiction over it.

Mr. Mayhew obtained permission from the Texas court to sell the certificates of deposit in Texas banks and reinvest the funds in Louisiana banks. The change was permitted, apparently for Mr. Mayhew's convenience since he is a Louisiana domiciliary. The Louisiana banks from which Mr. Mayhew purchased certificates of deposit on behalf of Mr. Caprito filed receipts for safekeeping with the Orange County, Texas court in which they agreed not to release funds without permission of the Orange County court. Mr. Mayhew continued to administer Mr. Caprito's estate through the Orange County court, filing the required bonds, statements of annual accounting, and seeking that court's permission to spend funds of the estate. Clearly, the movable property was under the continuing jurisdiction of the Texas court. Because the property was in this State only through permission of the Texas court, we hold that its mere location here did not confer jurisdiction over it.

DECREE

For the above reasons, the judgment of the trial court is reversed. All claims regarding the succession of Salvador Caprito are dismissed. Costs at trial and on appeal are assessed to defendants-appellees.

REVERSED AND RENDERED.

PROBATE NUMBER 20,582

SUCCESSION	NINTH JUDICIAL DISTRICT COURT
OF	
	PARISH OF RAPIDES
SALVADOR CAPRITO, a/k/a S. CAPRITO	STATE OF LOUISIANA

REASONS FOR JUDGMENT

This suit is a will contest. Plaintiffs, Marguerite Caprito Dial and Joseph T. Caprito, are the niece and nephew of the testator, S. Caprito. Defendants, Gertrude Caprito Daily, represented by her daughter and duly appointed guardian Helen Vaughan, and James C. Mayhew a/k/a Noel Caprito, are the daughter and son of the decedent.

Testator died March 9, 1982, in Rapides General Hospital, Alexandria, Louisiana, at the age of 98. He was born December 23, 1883. He was somewhat of a recluse and had amassed a substantial fortune during his long lifetime. He was also apparently eccentric, and he donated huge amounts of money and valuable properties to persons and to charities throughout his life. At the same time he lived a very humble and meager existence, often riding buses and living out of suitcases in hotel rooms until he was in his 90's.

Testator was married at one time to Annie Ehrhardt, later Mayhew. Mrs. Mayhew died January 7, 1964. Her marriage to S. Caprito ended in divorce in Dallas County, Texas, on December 14, 1915. The defendants, Gertrude Caprito Daily and James C. Mayhew, were born of this marriage.

Very little is known about testator's life by any of the contestants in this proceeding. None of them had contact with testator until he was an elderly man.

Testator's mental capacity was first questioned in the Tarrant County, Texas, Court by his long time CPA, William McKinney, who brought temporary guardianship pro-

ceedings against him in June, 1977. At this time, testator was living with his nephew, Joseph T. Caprito, in Franklin, Louisiana. On July 5, 1977, William McKinney was appointed temporary guardian of S. Caprito, a non compos mentis.

Subsequently, testator executed a will in Texas on October 7, 1977, in which he named Marguerite Caprito Dial and Joseph T. Caprito as the sole legatees of his estate. At this time, testator had moved in with Mrs. Dial at her residence in Lake Charles, Louisiana.

On December 8, 1977, permanent guardianship hearings were had in Tarrant County, Texas, and judgment was signed January 17, 1978, naming Mrs. Dial guardian over the person and the estate of testator. It was from this point until he fell and broke his hip in December, 1981, that he stayed with Mrs. Dial in Lake Charles. Mrs. Dial was paid $891.00 per month (which was later increased to $961.00 per month) for caring for testator.

Helen Vaughan, S. Caprito's granddaughter, and defendant Gertrude Caprito Daily's daughter, then applied to replace Mrs. Dial as guardian on April 28, 1978. The order replacing Mrs. Dial with Helen Vaughan was signed in the Tarrant County Court on June 7, 1978. Mrs. Vaughan transferred the estate to Orange County, Texas, in September, 1978. She remained guardian until she resigned in favor of her uncle James C. Mayhew in November, 1978. Even after Mr. Mayhew became guardian, Helen Vaughan continued to handle much of the guardianship business. She kept her name on the checking account and paid all testator's bills, including room and board to Mrs. Dial.

Mr. Mayhew had become guardian of his father's person and estate, although he had admittedly seen his father but 3 or 4 times prior to his nursing home stay.

During testator's four-year stay with Mrs. Dial he was in and out of the hospital many times. At first his health was good, but as he grew older his health became progressively worse. His treating physician, Dr. Ordinario, saw him on many of these occasions.

He entered the hospital confused and disoriented on

most of these admissions, but the hospital records show that upon leaving the hospital he had usually become oriented and alert.

Testator underwent hip replacement surgery on December 5, 1981. Upon his release from the hospital on January 7, 1982, James C. Mayhew arranged for him to be transported to Hilltop I Nursing Home in Pineville, Rapides Parish, Louisiana. On February 16, 1982, testator executed a new will, whereby his entire estate was left to Gertrude Caprito Daily and James C. Mayhew. It was at Hilltop I Nursing Home that he remained until his final illness which ended with his death at Rapides General Hospital on March 9, 1982.

Defendants, Helen Vaughan (representing Gertrude Caprito Daily) and James C. Mayhew, filed a petition for probate of statutory will in this court in the Succession of Salvador Caprito on March 17, 1982. The order for probate was signed the following day, March 18, 1982. The judgment of recognition and possession was signed March 26, 1982. Thereafter, plaintiffs filed the petition to annul probated testament and motion to stay proceedings on May 17, 1982.

Meanwhile, plaintiffs had filed a petition to probate the earlier will in the County Court at Law of Orange County, Texas, on March 17, 1982. This pleading was titled Application for Probate of Will and Issuance of Letters Testamentary. The order admitting the will to probate and authorizing letters testamentary was signed March 31, 1982.

The Louisiana proceedings deal with the will which was executed on February 16, 1982. The Texas proceedings deal with the will which was executed on October 7, 1977.

There are several preliminary issues for this Court to resolve before reaching a decision on the merits of the opponents' motion to annul the probated testament of Salvador Caprito.

First, all motions to stay or continue these proceedings are obviously moot since this entire case has been heard on the merits and submitted for decision.

Second, the Motion to Stay based on comity is denied. The decisions of the State of Texas regarding the mental capacity of S. Caprito to take care of his estate as well as himself has no bearing on the matter before this Court. The testator's mental capacity and ability to comprehend the act of executing a will must be determined from the facts and circumstances at the time of the execution. Therefore, this Court is legally bound to make that determination without deferring to any other court's previous determinations in unrelated matters.

Third, the Full Faith and Credit Clause of the United States Constitution is also inapplicable to this situation. This will contest raises questions not before any other court in this nation, and requires this Court to give the citizens before it a determination of the issues presented without deferring to another forum on those issues. Therefore, the Motion To Dismiss Due To Operation Of Full Faith And Credit is denied.

Fourth, the oral Motion To Rescind Probate And Judgment Of Possession is denied. The two objections raised by the opponents of the will are that the affidavit of death and heirship is by only one person and that the verification is signed by an incompetent. The Court finds that this issue has been rendered moot since ample sworn testimony presented cured these alleged defects.

Fifth, the Motion To Dismiss For Want Of Proper Venue is denied. S. Caprito had been living at Hilltop I Nursing Home, Pineville, Rapides Parish, Louisiana, for two months before he died. His guardian, James C. Mayhew, had taken him there, and, apparently, it was the intention of both S. Caprito and James Mayhew that this living arrangement continue. All of testator's belongings, simple as they were, were there, and all of his certificates of deposit were being held in Rapides Parish banks by Mr. Mayhew.

Also, the will itself, which this Court finds was duly executed by testator, contains a declaration in the very first paragraph that Rapides Parish, Louisiana, is the domicile of the testator. This express intention along with his physical presence and the presence of his legally appointed

guardian, (although no curator was ever appointed in Louisiana) is enough evidence for this Court to find that it has jurisdiction in this matter.

As to the due execution of the statutory will this Court finds no merit to the contentions of the plaintiffs. Plaintiffs' argument seems to be that the witnesses to a will must have an independent recollection of all the facts surrounding the execution of the will. This Court finds this to be a ridiculously high burden, and finds that the evidence presented by defendants amply supports a determination that the will was executed properly.

Further, as to the complained of lack of a declaration that testator could not read and sign the will, the testimony of the witnesses and the notary (along with the express declaration of the testator in the attestation clause of the will) is sufficient evidence to prove that the testator did indeed signify in some way the reason for not reading the instrument himself and for his inability to sign his own name.

Thus, it is the opinion of this Court that the statutory will formalities of L.S.A.-R.S. 9:2443 were met in the execution of this will.

Plaintiffs' final attack on the will relates to the mental capacity of S. Caprito to form the requisite intent to execute a will. The only expert testimony as to the mental capacity of testator comes from his treating physician, Dr. Ordinario.

This testimony, by deposition, is no more than an educated guess as to what the mental condition of testator may have been on February 16, 1982. Dr. Ordinario does say that S. Caprito was suffering from organic brain syndrome for many years as the result, primarily, of his age. This condition caused confusion and disorientation. However, it is also true that this confusion and disorientation would clear up from time to time (lucid intervals).

The testimony of all the people in testator's room on February 16, 1982, whether they be interested parties, neutral observers, or witnesses to the will, was the same – the testator was alert and knew what he was doing on February 16, 1982.

The medical testimony of Dr. Ordinario fails to overcome that strong presumption in favor of the mental capacity of the testator which our law provides. Therefore, the Petition To Annul Probated Testament and Motion To Stay Proceedings is dismissed.

All costs are assessed against Joseph T. Caprito and Marguerite Caprito Dial.

Alexandria Louisiana, this 25th day of July, 1983.

Signed: _____

ALFRED A. MANSOUR
District Judge
Division "A"

PROBATE NUMBER 20,582

SUCCESSION	NINTH JUDICIAL DISTRICT COURT
OF	
	PARISH OF RAPIDES
SALVADOR CAPRITO, a/k/a S. CAPRITO	STATE OF LOUISIANA

JUDGMENT

This cause having come on for trial on the 1st day of February, 1983, pursuant to regular assignment, present:

Mr. Lynwood Sanders and Mr. Pannal Alan Sanders, representing Contestants, Marguerite Caprito Dial and Joseph T. Caprito

Mr. Guy E. Humphries, Jr. and Mr. G. Earl Humphries, III, representing Noel Caprito a/k/a James C. Mayhew and Helen Vaughan, guardian of Gertrude Caprito Daily

Trial having been had and evidence and testimony adduced, and the law and evidence being in favor thereof, as per written reasons for judgment dated July 15, 1983, it is

ORDERED, ADJUDGED AND DECREED that all motions to stay or to continue are denied; it is further

ORDERED, ADJUDGED AND DECREED that the Motion to Stay based on Comity is denied; it is further

ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss Due to Operation of Full Faith and Credit is denied as being inapplicable to this situation; it is further

ORDERED, ADJUDGED AND DECREED that the oral Motion to Rescind Probate and Judgment of Possession is denied; it is further

ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss for Want of Proper Venue is denied; it is further

ORDERED, ADJUDGED AND DECREED that the opposition to the testament of Salvador Caprito of February 16, 1982, be dismissed as being without merit; it is further

ORDERED, ADJUDGED AND DECREED that the testament of Salvador Caprito of February 16, 1982, is declared to be a valid will and testament in accordance with the laws of the State of Louisiana and that Salvador Caprito was lucid and mentally alert and was well aware of what he was doing on February 16, 1982, at the time that he executed the testament in question; and that the Parish of Rapides was the domicile of Salvador Caprito at the time of his death; that the Ninth Judicial District Court is the court of proper venue and jurisdiction for the probate of this testament; it is further

ORDERED, ADJUDGED AND DECREED that the Contestants, Marguerite Caprito Dial and Joseph T. Caprito pay all costs of these proceedings.

JUDGMENT RENDERED on the 11th day of July, 1983.

JUDGMENT SIGNED on the 12th day of August, 1983.

ALFRED A. MANSOUR
DISTRICT JUDGE